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No. 87-1275

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

REPLAN DEVELOPMENT, INC.
and EDWARD C. RUBIN,
Appellants,

v.

DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT OF THE CITY OF NEW
YORK and THE CITY OF NEW YORK,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

APPELLANTS' REPLY BRIEF

PHILIP K. HOWARD
Attorney for Appellants
10 East 53rd Street
New York, New York 10022
(212) 751-8000

C. WILLIAM PHILLIPS
DAVID M. BADER

HOWARD, DARBY & LEVIN
Of Counsel

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TABLE OF CONTENTS

	PAGE
Table of Authorities	i
Conclusion	5

TABLE OF AUTHORITIES

Cases

Estate of Ekins v. *IRS*, 797 F.2d 481 (7th Cir. 1986)	2, 3
Welch v. *Henry*, 305 U.S. 134 (1938)	2

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Appellants Replan Development, Inc. and Edward C. Rubin ("Appellant") respectfully submit this reply brief in support of the Jurisdictional Statement.

The City devotes most of its brief to disingenuous attempts to avoid the constitutional issue squarely addressed and wrongly decided by the New York Court of Appeals: whether an affirmative tax inducement program, after inducing the desired investment, may be repealed retroactively.

This issue has never been addressed by the Court and is significant in an era when state and local governments increasingly use aggressive tax exemption programs to

promote specific investment. The City's motion to dismiss —which draws upon erroneous formulations used by the court below and certain federal courts of appeals—confirms the importance of this appeal.

1. The City argues that a retroactive repeal of a tax inducement statute implicates none of the constitutional guidelines decided by the Court 50 years ago with respect to gift taxes. *See Welch* v. *Henry,* 305 U.S. 134, 147 (1938). The purported distinction is that the gift tax was a "new tax never before imposed so that it could not have been reasonably anticipated." City Brief at 17. According to the City, a retroactive new tax is "vitally different" from the "retroactive elimination of a pre-existing tax exemption." *Id.* The City cites *Estate of Ekins* v. *IRS,* 797 F.2d 481 (7th Cir. 1986), for the proposition that retroactively "eliminating an exemption" raises no special constitutional issues. City Brief at 18.

The error in the analysis adopted by the Court of Appeals, by the Seventh Circuit and by the City is that the Constitution does not draw a distinction based on the tax device or category (i.e., an exemption *vs.* a levy; a property tax *vs.* gift tax; a new *vs.* an old tax). It is clear, for example, that a new income tax, even though new, could be imposed retroactively, subject only to such broader considerations as the length of the retroactive period.

The lesson of the Court's teachings on retroactivity of taxes, now 50 years old, is that the constitutional issues should hinge, not upon the *category,* but upon the *effect* of the tax change. *Welch* v. *Henry,* 305 U.S. at 147. Thus, within broad guidelines, taxes can be retroactively raised or lowered (whether by new taxes, new levies or removing an exemption), except that any tax change that materially affects the taxpayer's conduct in reliance upon prior law may not be imposed retroactively. *Id.*

This case involves a property tax exemption and abatement program. Based on the fact that property taxes are not new taxes, and on supposition that the development of property involves "some economic benefit from the conduct aside from the tax benefit" (A-4), the Court of Appeals concluded simplistically that no special constitutional problems were implicated. The structure of the J-51 tax inducement program, however, was that the investor was affirmatively induced to undertake the specific investment sought by the legislature—the "conversion of Class B to Class A multiple dwellings"—by the promise of as-of-right tax benefits. The amount of the tax inducement was huge—in this case, almost 40% of the underlying purchase price of the buildings.

It offends the Constitution for a statute to induce behavior and then retroactively repudiate the inducement. The offense does not relate to the flavor of the tax, but to its effect, which is to alter voluntary conduct. The decision below and the analysis of cases such as *Estate of Ekins* v. *IRS* apply an erroneous constitutional standard, and require review by the Court.

2. The City understandably squirms to avoid joining the issue. The City acknowledges that the City's J-51 Program was in effect at the time of Appellant's "commencement" of the renovation, as did the Court of Appeals (A-2, 44). Both nonetheless find satisfaction in asserting, as a justification for the inherent unfairness here, that the reasonableness of Appellant's reliance on the City law is questionable. The purported basis for the charge is that "Appellants were forewarned that changes might be made in the program when the state enabling legislation expired" in June 1982. City Brief at 12. However, it was not the state legislation but the City's own program that promised

the as-of-right inducement based upon City taxes. The record contradicts any suggestion that the City program would be changed retroactively; indeed, the City was actively and publicly encouraging renovations under the program. *See, e.g.*, Jurisdictional Statement at 3, Statement of City Corporation Counsel, July 2, 1982: "It's crystal clear that . . . . the program automatically lasts until October 31, 1984."

The City unfortunately goes beyond the bounds of advocacy in trying to argue that Appellant did not qualify for benefits because Appellant's administrative application certifying the actual costs of the renovation was filed after the change in law. City Brief at 3-4, 25-26. This proposition, which if true might mean there was never an as-of-right entitlement, is contradicted by the decisions below, which acknowledge that the black letter of the tax program provides that "commencement" of the renovation triggers entitlement to the benefits. A-3: "Having commenced the conversion of his two buildings in April 1983, petitioner falls squarely within the retroactive period." *See* A-9-10. The renovation, of course, must then be completed and the application showing costs, etc., has to be filed (by regulation, within 48 months), but the structure of the law requires that, even if the program were repealed entirely, the investor who "commenced" the renovation would be entitled to the promised tax benefits. Here, in fact, the project was substantially completed before the law was changed retroactively.

It is remarkable that the City feels the freedom to argue by stating a legal standard—that "vesting" is a function of filing the application after completion—that it knows is not true.

CONCLUSION

For the reasons stated herein and in our Jurisdictional Statement, the Court should note probable jurisdiction and hear the appeal.

Respectfully submitted,

PHILIP K. HOWARD

10 East 53rd Street
New York, New York 10022
(212) 751-8000

Counsel for Appellants

Of Counsel:

C. WILLIAM PHILLIPS
DAVID M. BADER

HOWARD, DARBY & LEVIN

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